No. 02-891

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS, THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, THE MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, THE SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

ERISA Section 203(a)(3)(B) authorizes a pension plan to "suspend[]" the "payment of benefits" for the period that a participant leaves retirement to return to the workforce in certain capacities. ERISA Section 204(g), the "anti-cutback" rule, forbids plan amendments that "decrease" previously accrued pension "benefits."

The question presented is whether a pension plan amendment regarding disqualifying employment that is authorized under ERISA Section 203(a)(3)(B) is nonetheless forbidden by Section 204(g) to the extent it applies to previously accrued benefits.

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Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, codified at 29 U.S.C. §§ 141—187;
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TABLE OF AUTHORITIES—Continued

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Barron's Online, Gene Epstein, "Retire? Hell No!" (Mar. 27, 2000)	17
Bureau of Labor Statistics, U.S. Dep't of Labor. Employee Tenure in 2000, (BLS newsletter, 2001)	8
Bureau of Labor Statistics, U.S. Dep't of Labor, Unemployment Rates and Levels in the Construction Industry, 1974-2003	15
Construction Lab. Rep. (BNA), "Policy Needs to Address Worker Shortage Affecting All Industries, House Panel Told," v. 45, no. 2266 (Feb. 23, 2000)	17
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Construction Lab. Rep. (BNA), "Skilled Labor Shortages Head List of Contractors' Greatest Concerns," v. 45, no. 2259 (Jan. 5, 2000)	15
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Construction Lab. Rep. (BNA), "Parties in Northwestern States Bargain in Heated, Full Employment Economy," 18, v. 46, no. 2267 (Mar. 1, 2000)	16
Construction Lab. Research Council, "Craft Labor Supply Outlook, 2000-2010," 1998	17

TABLE OF AUTHORITIES—Continued

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Daily Lab. Rep. (BNA), "Low Unemployment Rates Prompt Employers to Turn to Untapped Labor Pools," S-7, no. 123 (June 26, 2000)	16
Daily Lab. Rep. (BNA), "Worker Shortages Restrain Otherwise Robust Pace As New Pay Schemes Abound," no. 99 (May 24, 1999)	17
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N.Y. Times, Elsa Brenner, "Brighter Outlook for Construction Workers" (Dec. 12, 1993)	16
S. Rep. No. 93-383, at 50 (Aug. 21, 1973)	11
Staff of the Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986 (May 4, 1987)	25
Wall St. J. Online, Jonathan Weil, "Golden Triangle Boom Causes Labor Shortages" (Apr. 22, 1998)	16
Wall St. J. Online, Rick Wartzman, "The Price of Recovery: Builders' Labor Squeeze" (Jan. 22, 1997)	16
Wall St. J. Online, Rebecca Blumenstein, "Michigan and Ohio Compete for Workers Amid Shortage" (June 10, 1997)	16
Wall St. J. Online, Kelly Greene, "Making it Hard to Work" (Dec. 7, 2003)	17
Wall St. J. Online, Kelly Greene, "Companies Could Entice Older Workers to Stay On" (Nov. 20, 2002)	17

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Wall St. J. Online, Marjorie Valbrun and Glenn Burkins, "Tight Labor Market Causes Leaders to Rethink Immigration Restrictions" (Feb. 10, 2000)	17
Webster's Third New International Dictionary of the English Language Unabridged (1992)	11
Weinstein, Harriet and Wiatrowski, William J., Multiemployer Pension Plans, *Compensation and Working Conditions*, Spring 1999	9

INTEREST OF THE *AMICI*[1]

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of employee benefits legislation and regulations promulgated to implement the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. § 1001—1169, and other laws affecting multiemployer plans. Currently, 311 multiemployer pension plans are affiliated with the NCCMP. These affiliated plans cover a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. The NCCMP has frequently participated as *amicus curiae* in the United States Supreme Court and the federal courts of appeal.

The Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) are nonprofit, tax-exempt organizations representing the interests of employers in a large segment of the high-skill and high-wage construction trades. There are 2,200 employers affiliated with the MCAA and its affiliated associations nationwide. NECA has 4,420 member contractors in the United States with an excess of 19,000 contractors who currently authorize NECA and its local chapters to bargain on their behalf. There are approximately 1,900 employer members of SMACNA throughout the United States.

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[1] Pursuant to Rule 37.6 of the Rules of the Court, the undersigned hereby state that no counsel for Petitioner or Respondents authored any part of this brief. Moreover, no person or entity other than the NCCMP made a monetary contribution to the preparation or submission of this brief.

The contractors affiliated with these employer associations specialize in an array of trades and crafts including electrical, mechanical, plumbing, heating, ventilating and air conditioning, architectural and industrial sheet metal, specialty stainless steel, energy management and industrial testing. Employer members work in a variety of industries including construction, service, maintenance, utilities, telecommunications, broadcasting, manufacturing, transportation and government. The MCAA, NECA and SMACNA, their related entities and their member employers are distinguished for their longstanding and vast investment in the training and development of high-skilled workforces. Through collective bargaining with their union counterparts, member employers sponsor and fund numerous multiemployer benefit plans including apprenticeship and training plans, health and welfare plans, and retirement benefit plans including multiemployer defined benefit pension funds.

The Laborers' International Union of North America, AFL-CIO (LIUNA), the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (UA), the Sheet Metal Workers' International Association, AFL-CIO (SMWIA) and the International Brotherhood of Electrical Workers, AFL-CIO (IBEW) are unincorporated labor organizations that represent employees in a variety of trades. LIUNA, with over 800,000 members, is a diverse, multi-craft union representing workers in various fields of construction, including highway, tunnel, pipeline and building construction and hazardous material removal. The UA, with over 300 local union affiliates and approximately 326,000 members, both active and retired, is a multi-craft union representing high-skilled workers engaged in the fabrication, installation and servicing of piping systems. The SMWIA, with a membership of around 155,000—of whom 30,000 are retirees—represents high-skilled sheet metal workers in industries such as building and construction, shipyards, railroads, and service

and maintenance. The IBEW—which has over 780,000 members—represents employees who work in a variety of industries, including utilities, construction, telecommunications, broadcasting, manufacturing, railroads and government.

Collectively, these labor organizations and their local affiliates negotiate collective bargaining agreements on behalf of workers throughout the country. Through the collective bargaining process, these unions provide employers with a highly skilled and trained workforce and strive to foster industrial stability through labor-management cooperation. The agreements negotiated by the LIUNA, UA, SMWIA and IBEW on behalf of the employees they represent include critical benefit packages that require signatory employers, *inter alia*, to contribute to multiemployer pension plans.

Multiemployer pension plans provide pension coverage for some ten million American workers, one-fifth of all workers who participate in pension plans. By law, these plans are administered by boards of trustees comprised of individuals appointed by both labor and management; each trustee owes a duty of loyalty to plan participants and beneficiaries. The well-being and security of employees, retirees and their dependents are directly impacted by multiemployer pension plans, and interference with the maintenance and growth of such plans is deemed to be contrary to the national public interest. 29 U.S.C. § 1001a(a)(1), (3) and (c)(2).

The NCCMP and its member plans have a strong interest in urging reversal of the decision below. If allowed to stand, the holding will significantly and adversely impact the effective administration and financial well-being of multiemployer pension plans. It will detract from the ability of trustees to employ ERISA's "suspension of benefit" rules in response to fluctuating employment and retirement patterns that impact the plans' current funding status. The NCCMP, the sponsoring employer associations and the unions also have a strong interest in protecting against the potential adverse impact of

"double dipping"[2] on the funding of plans, especially in times of economic distress or uncertainty.

The employer associations have a strong interest in ensuring that their members' employees participate in adequately funded and efficiently administered pension plans so that the value of employer contributions will ultimately translate into valuable retirement benefits for current employees. The employer associations also have a residual interest in seeing that plans can respond to fluctuating labor markets by enabling early retirees temporarily to rejoin the labor force. Further, having made the financial contributions that have funded the pensions of many double dipping retirees, these *amici* have a stake in insuring that those contributions are not used to subsidize the low-wage workforces of competitors when work is scarce.

The union *amici* have a strong interest in ensuring that the workers they represent will receive meaningful pension benefits at retirement, especially those workers who, upon retirement, have few additional sources of income or are permanently disabled or are otherwise unable to return to the workforce. The unions also have an interest in preserving the job opportunities, wage rates and benefits of active employees, and in providing a steady and reliable stream of skilled workers to signatory employers, which interests would be undermined by the change to regulation of suspension of benefit rules which is proposed in this case.

Finally, the NCCMP, the employer associations and the unions fear that the decision below will expose a number of

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[2] In the context of this case, double dipping occurs when a retiree who is receiving pension benefit payments returns to employment while his pension payments continue. Thus, pension payments subsidize his wages. If a retiree returns to employment in the trade or craft covered by the plan that provides his benefits, the retiree simultaneously may be accruing additional pension benefits under the plan.

multiemployer pension plans to significant unanticipated liabilities. Plan trustees have long relied on the position of the courts and the Internal Revenue Service that amendments like those challenged by the Respondents do not violate ERISA's anti-cutback rules. A reversal to this rule of law would result in additional liabilities and reassessment of longstanding funding assumptions, at the inevitable expense of active plan participants and current retirees.

Both Petitioner and Respondents have consented to the filing of this brief, as is evidenced by letters of consent that have been filed with the Court.

SUMMARY OF ARGUMENT

A. Through Section 203(a)(3)(B) of ERISA, Congress provided that certain specifically defined suspensions of benefit payments were not to be construed as forfeitures of accrued benefits prohibited under ERISA Section 203(a). Section 203(a)(3)(B)(ii) permits a multiemployer pension plan to suspend a benefit payment to a participant who would otherwise be entitled to receive such payment but for the fact of his return to specified categories of employment after retirement. By this provision Congress intended to alleviate the adverse impact double dipping participants can have on the financial well-being of multiemployer plans, their participants and beneficiaries, sponsoring employers, labor markets, industrial stability, and wages and conditions of employment in a particular industry.

B. Since the enactment of ERISA many multiemployer pension plans have used the suspension provision of ERISA Section 203(a)(3)(B)(ii) as a means of encouraging or discouraging returns to employment by retirees in the relevant industry. This provision, which limits the scope of ERISA's nonforfeiture rules, was intended as a tool multiemployer pension plans could use to deal with the economic exigencies that may affect a particular industry or a plan's actuarial

soundness at any given time. For suspension of benefit rules to be effective over time, multiemployer plans must have the flexibility to expand the scope of disqualifying employment when economic conditions warrant, in order to maintain actuarial soundness and to protect the interests of actual retirees and active non-retired participants.

C. For years, the Internal Revenue Service has consistently approved plan amendments that have either introduced suspension of benefit provisions or expanded the scope of disqualifying employment for purposes of existing suspension of benefit provisions. There is no evidence that the Internal Revenue Service has ever challenged a plan's adoption of a suspension of benefit provision that falls within the scope of ERISA Section 203(a)(3)(B). The longstanding position of the IRS, which has been incorporated into the Service's Multiemployer Plan Examination Guidelines of the Internal Revenue Manual,[3] is supported by the plain meaning of the statute and takes into account the diverse interests served by the Act. Relying on the statute, prior court decisions and IRS guidance, trustees of multiemployer pension plans have amended plans either to add suspension of benefit provisions or expand definitions of disqualifying employment without reason to fear they might be violating the anti-cutback rule of ERISA Section 204(g), the provision erroneously relied upon by the majority below.

[3] *See* Internal Revenue Manual, at § 4.72.14.3.5.3(7) ("Suspension of Benefits") (May 4, 2001) (available on WESTLAW RIA-IRM database) (hereinafter "Multiemployer Plan Guidelines"). The Multiemployer Plan Guidelines set forth the technical guidance for the Service's field personnel, technical staff, and plan determination personnel. Internal Revenue Manual § 4.72.14.1.

ARGUMENT

AN AMENDMENT TO A MULTIEMPLOYER PENSION PLAN THAT, CONSISTENT WITH ERISA SECTION 203(A)(3)(B), PROVIDES FOR THE SUSPENSION OF PAYMENT OF EARLY RETIREMENT BENEFITS DURING PERIODS THAT A PARTICIPANT, AFTER RETIRING, ENGAGES IN CERTAIN EMPLOYMENT DOES NOT VIOLATE THE ANTI-CUTBACK PROVISIONS OF ERISA SECTION 204(g).

A. Through ERISA Section 203(a)(3)(B)(ii), Congress sought to protect multiemployer pension plans, plan participants, contributing employers and sponsoring labor organizations from the adverse impact of double dipping retirees.

1. *As Congress has expressly recognized, multiemployer pension plans serve a unique function in providing retirement income security for millions of Americans who would not otherwise have access to pension coverage.*

In ERISA, Congress declared that the private employee benefit system is "affected with a national public interest," and determined that the regulation of private employee benefit plans would be exclusively a federal concern. ERISA Section 2(a), 29 U.S.C. § 1001(a). The Multiemployer Pension Plan Amendments Act ("MPPAA"), Pub. L. 96-364, Stat. 1209-1210, was adopted in 1980 to enhance the financial soundness of multiemployer pension plans[4] and to foster

[4] Multiemployer pension plans are maintained pursuant to collective bargaining agreements. ERISA Section 3(37), 29 U.S.C. § 3(37). Multiemployer plan assets are held in trust, and the plans are jointly administered and equally represented by trustees appointed by management and labor. Labor Management Relations Act of 1947 § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B).

their maintenance and growth. *See* MPPAA § 3, 29 U.S.C. § 1001a; Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H.R. Rep. No. 96-869, pt. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918. *See also NLRB v. AMAX Coal Co.*, 453 U.S. 322, 338 n.22 (1981). MPPAA, which amended both ERISA and the Internal Revenue Code, demonstrates Congress's recognition of the special needs of such plans, which serve millions of employees, retirees and dependents.

Multiemployer plans fill an important need in industries in which single employer pension plans cannot suffice to protect the typical employee. Employees in industries such as construction or trucking, which are characterized by irregular employment or frequent shifts of workers between employers, benefit from the availability of multiemployer plans.[5] Similarly, these plans provide benefits at an affordable cost in industries dominated by small employers such as garment manufacturers, restaurants and service establishments, which would not individually be able to support an adequate and secure pension plan for their employees.

In general, multiemployer pension plans are designed to allow employees to gain credits toward pension benefits from work with multiple employers who contribute to the plans in accordance with the terms of the employers' collective bargaining agreements. Some plans cover participants in a trade or craft throughout the country, while others provide coverage for employees of contributing employers in a particular industry in a specific geographic area. In either situation, workers are able to move from job to job while continuing to earn credits toward their pension benefit.

[5] Among construction workers, the median tenure with an employer in January 2002 was 2.8 years, compared with 3.5 years for all workers. Bureau of Labor Statistics, U.S. Dep't of Labor, Employee Tenure in 2000, (BLS newsletter, 2001), *available at* ftp://ftp.bls.gov/pub/news.release/tenure.txt.

Moreover, because multiemployer pension plans continue even if particular employers go out of business, such plans help protect workers from the potentially devastating consequences of business downsizing, mergers and closings.

While multiemployer plans generally function in the same manner as their single-employer counterparts, certain features of multiemployer defined benefit pension plans[6] reflect the special needs of their participants. For instance, multiemployer plans are far more likely to include provisions that allow for portability of pension credits among different multiemployer plans. Such programs ensure that participants will vest in and receive a meaningful pension benefit even though they may work in numerous jurisdictions covered by numerous plans. Over 60 percent of multiemployer plans have such portability provisions, compared with 3 percent of single employer plans.[7]

[6] Three out of five multiemployer pension plans are defined benefit plans. Defined benefit plans, like the plan administered by the Petitioner, cover approximately 80 percent of multiemployer pension plan participants. Defined benefit pension plans generally provide for a benefit stated in the form of a life annuity with benefit formulas based on a number of factors requiring a variety of actuarial projections. By contrast, money purchase plans, 401(k) plans and other defined contribution plans provide for contributions in specified amounts to be made to separate "individual accounts" for each participant. Typically, multiemployer defined contribution plans do not include suspension of benefit provisions. Most of these plans provide lump sum benefit options or purchase annuity contracts from insurance companies with the assets held in a participant's individual account.

[7] Other notable distinctions include the fact that only 69 percent of single employer plans provide for disability retirement benefits, compared with 91 percent of multiemployer plans. Also, multiemployer plans are far more likely to provide full pension restoration if a spouse predeceases the participant and are far more likely to provide survivor benefits to children. Harriet Weinstein and William J. Wiatrowski, Multiemployer Pension Plans, *Compensation and Working Conditions*, Spring 1999, at 21, *available at* http://www.bls.gov/opub/cwc/archive/spring1999art4.pdf.

Another characteristic of multiemployer pension plans, especially those providing benefits to participants in the construction industry and related trades and crafts, is that they typically offer early retirement benefits which are often subsidized, *i.e.*, the benefits are not actuarially reduced to account for early retirement. As Congress has recognized, these subsidized early retirement pensions serve an important function in physically demanding occupations:

> [C]onstruction work is physically hard, and is often performed under harsh climatic conditions. Workers are worn down sooner than those in most other industries. Often, early retirement is a must. Multiemployer pension plans accommodate these needs of their covered workers by providing for early retirement, disability, and service pensions that provide a subsidized, partial or full pension benefit.[8]

Thus, participants who will not reach normal retirement age under a plan for many years will nonetheless be eligible for a subsidized early retirement benefit if they have completed a minimum number of years of service. Significantly, because the benefits are subsidized, they are more expensive to the plan than benefits provided on or after normal retirement age.

2. *Recognizing the unique features and potential vulnerability of multiemployer pension plans and their sponsoring entities, Congress created a special mechanism both to protect the financial well-being of plans and to enhance industrial stability.*

Under Section 203(a)(3)(B)(ii) of ERISA, a multiemployer plan may include provisions suspending retirement benefit payments when the retiree returns to work in the same

[8] 144 Cong. Rec. 7574, 7578 (daily ed. July 7, 1998) (statement of Sen. D'Amato).

industry, in the same trade or craft, and in the same geographic area covered by the plan without violating the nonforfeitability requirements set forth in Section 203(a).[9] Employment that will trigger suspension of benefit payments is commonly referred to as "disqualifying employment."[10] Thus, if a retiree enters disqualifying employment, ERISA Section 203(a)(3)(B)(ii) provides that the plan's temporary[11] withholding of benefit payments while the retiree works in

[9] In adopting Section 203, Congress recognized the need to ensure that pension rights, once they are required to be vested, may not be lost by an employee. S. Rep. No. 93-383, at 50 (Aug. 21, 1973), *reprinted in* 1 Leg. Hist. at 1118. A form of forfeiture prevalent before the enactment of ERISA that particularly concerned Congress, known as "bad boy" clauses, serve to deprive an employee of a benefit simply because he later went to work for a competitor, or in some other way demonstrated "disloyalty" to the employer. *See id.;. Noell v. American Design, Inc.*, 764 F.2d 827 (11th Cir. 1985) (discussing the relationship between ERISA's vesting requirements and a plan's bad boy clauses).

[10] Since 1981, regulations promulgated by the Department of Labor have specified a range of permissible definitions of disqualifying employment. *See* 29 CFR §2530.203-3 *et seq*.

[11] The word "suspend" (the term used in Section 203(a)(3)(B)) means "to cause (as an action, process, practice, use) to cease for a time : stop temporarily. . ." Webster's Third New International Dictionary of the English Language Unabridged (1992) (def. 2a). A suspension of pension payments under Section 203(a)(3)(B) is clearly a temporary action. It ceases when the participant stops working in disqualifying employment or on the participant's "required beginning date," *see* I.R.C. § 401(a)(9)(C), whichever is earlier.

A suspension of benefit payments in theory could become permanent if a participant died with no survivor benefit payable, but this circumstance would not render the suspension a forfeiture due to a separate provision of the Act. *See* ERISA Section 203(a)(3)(A) ("A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in Section 205)), 29 U.S.C. §1053(a)(3)(A).

disqualifying employment will not be deemed a forfeiture of an accrued benefit under Section 203(a) of the Act.

Multiemployer plans may adopt suspension of benefit rules restricting post-retirement employment to the full extent permitted under Department of Labor regulations, they may narrowly tailor restrictions on post-retirement employment to certain types of employment that fall within the range permitted by the regulations, or they may choose not to restrict post-retirement employment at all. Trustees of multi-employer plans have come to regard suspension of benefit rules as an important element of plan design which primarily helps trustees respond to funding issues which can be impacted by retiree reemployment in the industry covered by a plan.

Relevant considerations such as the actuarial soundness of pension plans, industrial stability, conditions of employment, and investment performance of fund assets are not fixed in time but are impacted by fluctuations in unemployment rates, the relative aging of a workforce, the vagaries of financial markets, or other unforeseen events that impact the entire economy, specific industries or particular regions. The trustees of multiemployer pension plans, representing both labor and management, are uniquely qualified to assess those circumstances insofar as they pertain to their own plans at any given time. Using that expertise, the trustees can employ a suspension of benefit provision as a dynamic and adaptable tool for addressing a number of economic exigencies.

The plans' need for flexibility and the ability to protect against the adverse effects of double dipping were driving forces behind Section 203(a)(3)(B). Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, detailed the congressional purpose in the following terms:

> The type of suspensions contemplated by this provision are those which prevent plan assets from being used to pay retirement benefits to persons who have, in fact, returned to work for employers covered by the plan. Also contemplated are provisions designed to protect participants against their pension plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of employees covered by the plan. . . .

120 Cong. Rec. 29928, 29930 (daily ed. Aug. 22, 1974), *reprinted in* 3 ERISA Leg. Hist. of the Employee Retirement Income Security Act of 1974, at 4738 ("ERISA Leg. Hist."). Senator Javitz echoed these sentiments:

> The purpose of this limited exception to what is generally a rule precluding divestiture of vested benefits is to protect unions against undercutting of wage scales and the additional expense generated by the need to subsidize retirement benefits for those who have left the work force as well as retirement benefits for those continuing to work—if such a course was required. . . . The purpose of the suspension rule is to protect the legitimate interests of the union with respect to those persons who have really not retired and not to penalize retirees where, on balance, the interest of the union are not adversely affected to a substantial degree.

120 Cong. Rec. 29928, 29942 (daily ed. Aug. 22, 1974), *reprinted in* 3 ERISA Leg. Hist. 4772. Representative Dent outlined the role Department of Labor regulations would play to further the purposes articulated by his Senate counterparts:

> [T]he conferees expressly provided in Section 203(a)(3)(B) that a plan be permitted to suspend benefits under certain circumstances. This section further authorizes the Secretary to prescribe regulations necessary to carry out the purposes of this provision. It is contemplated that those regulations would permit a plan's provisions concerning suspension to take into account the particular facts and circumstances of the industry; the objectives of industrial stability; the conditions of employment and earnings in the industry;

the benefit payment period of the plan; and the burden of onerous and costly administrative procedures imposed upon the plan by these provisions.

120 Cong. Rec. 29192, 29197 (daily ed. Aug. 22, 1974), *reprinted in* 3 ERISA Leg. Hist. at 4669.

Accordingly, Section 203(a)(3)(B) fairly may be said to provide a safe harbor for multiemployer pension plans within which they may adopt suspension of benefit provisions tailored to particular plan needs at any given time without running afoul of ERISA's rules governing forfeitures.

B. Multiemployer plan trustees periodically have amended suspension of benefit rules in order to address changing employment and economic conditions, precisely as was envisioned by Congress.

ERISA Section 203(a)(3)(B) is an unusual provision of the Act in that its purpose, as articulated by its drafters, is directed to some extent toward matters beyond plans and their participants. Congress recognized that in order to have well-funded pension plans and secure, meaningful retirement benefits for participants, it was appropriate under certain circumstances to permit plan sponsors to limit the adverse impact that payment of pension benefits to active employees may have on the industry that funds the plan. It follows that the scope of a plan's suspension provisions can be tailored to reflect the economic conditions of the underlying industry at given points in time.

1. The factors and conditions which prompted Congress to adopt ERISA Section 203(a)(3)(B)(ii) are not static over time.

Although employer contributions made on behalf of retirees when they were active participants help to fund their pension benefits, multiemployer defined benefit plans also rely on current employer contributions to fund the pension

benefit obligations of retirees and current employees. Consequently, periods of high unemployment will significantly impact the actuarial soundness of these plans. On the other hand, periods of low unemployment create their own set of problems for contributing employers and underlying Industries—most significantly, skills shortages. Deep and frequent fluctuations between periods of high and low unemployment are commonplace in the industries in which multiemployer plans predominate, and can have a debilitating effect on plan funding.

Since the enactment of ERISA, nationwide unemployment rates in the construction industry have fluctuated from levels as low as 8 to 9 percent in the mid 1970's to levels as high as 18 to 23 percent in the early 1980's. By the end of the 1990's, which was characterized by a boom in construction, unemployment levels retreated back down to 6 to 9 percent. In between these long-term trends, the construction industry experienced regular double digit percentage swings in unemployment levels from year to year.[12]

These pronounced cyclical patterns of unemployment generate their own set of problems for the affected industries. During downturns, there is typically a corresponding exodus of skilled workers from the industry, with workers leaving a depressed trade or craft permanently for better opportunities elsewhere. Conversely, during boom periods, shortages in skilled labor cause tremendous problems for employers and their customers. *See* "Skilled Labor Shortages Head List of Contractors' Greatest Concerns," Construction Labor Report, v. 45, no. 2259 (Jan. 5, 2000).

Nationwide trends only tell part of the story. More refined studies show that even greater volatility in employment

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[12] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Unemployment Rates and Levels in the Construction Industry, 1974-2003 (Series LFS2101060020(1) and LFS2202060020(1).

cycles is found among local and regional areas and among the various trades. In a 2000 report by the Associated General Contractors, for example, surveys showed that although skilled bricklayers, operating engineers, electricians, sheet metal workers, plumbers and pipe fitters were scarce in Delaware, there was no shortage of available carpenters, cement masons, iron workers, roofers and laborers in that state. In that same study, the data for neighboring Maryland showed the opposite result. Similarly, during a period when Mississippi Valley contractors described the workforce for all craft classifications as plentiful, most crafts were reported to be in short supply in Virginia and the Carolinas.[13]

While the construction industry has addressed labor shortages in the past through recruitment and training programs, those approaches alone have offered little immediate relief, oftentimes adding to the ranks of the unemployed once a boom recedes. An alternative to these approaches is to fill openings for skilled trades with retirees. Reentry of retirees into the workforce provides immediate relief to employers by providing a pool of candidates who arrive ready with the

[13] *See "AGC Report Finds Continued Dominance of Market by Open Shop, Skill Shortages,"* Construction Lab. Rep. (BNA) 881, v. 46, no. 2295, Sept. 27, 2000; *see also "Skilled Shortages Prompts Contractors in Idaho to Sign Pacts with Carpenters,"* Construction Lab. Rep. (BNA) 717, v. 46, no. 2291, Aug. 23, 2000 (regarding the shortage of skilled carpenters in Boise); *"Low Unemployment Rates Prompt Employers to Turn to Untapped Labor Pools,"* Daily Lab. Rep. (BNA) S-7, no. 123, June 26, 2000 (regarding the labor market in New England); *"Parties in Northwestern States Bargain in Heated, Full Employment Economy,"* Construction Lab. Rep. (BNA) 18, v. 46, no. 2267, Mar. 1, 2000; Jonathan Weil, *"Golden Triangle Boom Causes Labor Shortages,"* Wall St. J. Online, Apr. 22, 1998 (Southeast Texas); Rick Wartzman, *"The Price of Recovery: Builders' Labor Squeeze,"* Wall St. J. Online, Jan. 22, 1997 (California); Rebecca Blumenstein, *"Michigan and Ohio Compete for Workers Amid Shortage,"* Wall St. J. Online, June 10, 1997 (Michigan and Ohio); Elsa Brenner, *"Brighter Outlook for Construction Workers,"* N.Y. Times, Dec. 12, 1993, 13WC, at 1 (White Plains, NY).

requisite experience and skills.[14] The challenge in relying on this supplemental retiree workforce is to provide an incentive for the retirees' return and a disincentive for them to remain in the event high unemployment returns.

2. *Multiemployer pension plan trustees have used suspension of benefit provisions to encourage retirees to reenter the workforce and, when necessary, to discourage retirees from remaining.*

Double dipping undoubtedly effects a drain on the resources of multiemployer pension plans. While employer contributions on behalf of vested and non-vested active participants provide an inflow of assets into the plan with no concomitant outflow to these participants, double dipping retirees receive subsidized benefit payments from the fund while taking jobs that could be filled by the active vested or non-vested participants. Moreover, while some double dipping retirees may return to covered employment and have contributions made to the plan on their behalf, others may go to work for competing employers who do not contribute to the plan and who enjoy significantly lower labor costs than

[14] *See Craft Labor Supply Outlook, 2000-2010,* Construction Lab. Research Council , 1998; Kelly Greene, *"Making it Hard to Work,"* Wall St. J. Online, Dec. 7, 2003; Kelly Greene, *"Companies Could Entice Older Workers to Stay On,"* Wall St. J. Online, Nov. 20, 2002; *"Policy Needs to Address Worker Shortage Affecting All Industries, House Panel Told,"* Construction Lab. Rep. (BNA) 1425, v. 45, no. 2266, Feb. 23, 2000; Gene Epstein, *"Retire? Hell No!,"* Barron's Online, Mar. 27, 2000; Marjorie Valbrun and Glenn Burkins, *"Tight Labor Market Causes Leaders to Rethink Immigration Restrictions,"* Wall St. J. Online, Feb. 10, 2000; *"Worker Shortages Restrain Otherwise Robust Pace As New Pay Schemes Abound,"* Daily Lab. Rep. (BNA), no. 99, May 24, 1999; *"CPWR Considers Research Agenda on Bargaining, Workforce Issues,"* Construction Lab. Rep. (BNA), v. 44, no. 2177, Apr. 29, 1998.

the employers whose contributions funded those retirees' pension benefits, health benefits and training.[15]

Nevertheless, current conditions in a specific industry, trade or craft, such as a regional skills shortage at times of full employment, may indicate that a degree of double dipping is in the best interest of the plan. This also offers retired participants an opportunity to supplement their incomes without harming the plan's overall financial well-being. Most multiemployer pension plans have been amended over time to provide for the suspension of benefits under some prescribed conditions. However, the range among plans for what constitutes "disqualifying employment," especially before normal retirement age, is dramatic and—like the industries themselves—often subject to change.[16]

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[15] *See* discussion, *supra*, at 13-14 (thus, Congress' concern that multiemployer pension plans would help to subsidize the labor costs of employers who pay low wages and little or no benefits).

[16] In the preamble to its Proposed Suspension of Benefit Rules, the Department of Labor acknowledged that multiemployer plans could adopt a wide range of suspension of benefit rules:

> It should be noted that Section 203(a)(3)(B) and this regulation do not require plans to provide for or impose suspensions of benefits. In addition, while a suspension may not be imposed unless the requirements of the Act and this regulation would be met, the Department is of the view that a plan which has elected to provide for suspension of benefits is not required to provide for suspension of benefits to the fullest extent that the Act and this regulation would permit. For example, a plan could provide that "Section 203(a)(3)(B) service" . . . would result when an employee contemplates 60 or more hours of service in a calendar month in the relevant type of employment. . . As another example, a multiemployer plan could provide that the "geographic area covered by the plan" does not include all the territory which would qualify for inclusion under the Act and this regulation. . .

For example, many plans may draft suspension provisions that are triggered only by full-time work or that limit suspensions to those retirees who primarily work "with the tools" and do not serve as supervisors. Many other plan trustees choose to apply the strictest suspension rules available under the Act and regulations, with the knowledge that restrictions can be eased to accommodate changed conditions (such as the commencement of a large public project) which demand that employers retain a particularly large workforce for an extended period of time.

It is true, as the court below noted, that plan rules that use a narrow definition of disqualifying employment effectively permit many early retirees to engage in double dipping. Pet. App. 10a n.6. The practice, however, is often a mixed blessing, and a plan's circumstances can readily change so as to render double dipping an undue burden on the plan and on other participants. As discussed above, the trustees of a multiemployer plan may choose to abide a certain level of double dipping when economic conditions in a specific industry, trade or craft so warrant and when the plan's current funding permits.[17] When those conditions change, plans require the ability to re-adjust their suspension rules.

Department of Labor, Office of Pension and Welfare Benefit Programs, "Minimum Standards for Employee Benefit Plans; Suspension of Benefit Rules; Final Rules and Proposed Rulemaking," Fed. Reg. 8894-8895 (Jan. 27, 1981).

[17] Indeed, the unprecedented performance of the U.S. financial markets and generally high employer contribution levels during the 1990s compelled multiemployer pension plan trustees to either provide greater benefits or subject their contributing employers to onerous tax liabilities. *See generally*, I.R.C. §§ 404(a)(1)(A) and 412(a) (limiting the amount deductible in any year for contributions to a qualified pension trust to the amount necessary to satisfy the minimum funding standard).

What is more, plans must continually meet ERISA's minimum funding standards notwithstanding the fact that plan assets are typically invested in equity and fixed income securities subject to the vagaries of Wall Street. Moreover, the total amount of employer contributions, which provides the ongoing funding to such plans, is based solely on the hours worked by the employers' employees, even in times of high unemployment.[18] Thus, multiemployer pension plans have often exercised the option of amending their suspension of benefit provisions in a way that restricts the employment opportunities available to early retirees who want their benefit payments to continue. As we discuss below, such amendments have proceeded with the full knowledge and blessing of the relevant regulatory agency, the Internal Revenue Service.

[18] For multiemployer defined benefit plans, suspension rules are especially valuable in the trustees' efforts to regulate funding requirements. An employer sponsoring a single employer defined benefit plan has complete control over how its plan will be funded and will generally seek to fund the plan within the range prescribed in I.R.C. §§ 412 and 404(a)(1). By contrast, multiemployer defined benefit plans are funded through contributions made by numerous employers who are required to pay rates fixed in accordance with collective bargaining agreements with durations of several years or more. Such contribution rates typically cannot be changed during the term of collective bargaining agreements to accommodate deficits or surpluses, and negotiated contribution rates must be sufficient to pay future benefits. Thus, multiemployer plan sponsors do not control, but merely anticipate, the amount of contributions coming into the fund from year to year.

C. Multiemployer plan trustees have administered plans and adopted suspension of benefit amendments in reliance on the stated position of the Internal Revenue Service and the courts; a change to that rule will have an unfair adverse impact on plans, their participants, contributing employers, and labor organizations.

1. *Prior to the decision below, multiemployer pension plan trustees could rely on a uniform body of authority to freely adopt or amend suspension of benefit provisions within the scope of ERISA §203(a)(3)(B)(ii).*

For many years, the Internal Revenue Service and the courts, relying on the plain meaning, purpose and structure of the statute, have recognized that a "suspension" of benefit payments under ERISA Section 203(a)(3)(B) is not a decrease, reduction or elimination of an accrued benefit within the meaning of Section 204(g) of ERISA. Specifically, the Service and the courts have construed Section 203(a)(3)(B) as a special provision defining the scope of vested rights under Section 203(a).[19] This construction gives effect to Congress's intent, clearly articulated in the legislative history of Section 203(a), not to protect the ability of early retirees working in 203(a)(3)(B) employment to continue receiving benefit payments while so employed. The majority below, in contravention of the statutory purpose, would create such a right

[19] *See* cases cited in note 24 and accompanying text. In contrast to those holdings, the majority below finds that ERISA Section 204(g) *implicitly* prohibits amendments that suspend benefit payments of retirees. If in fact Congress sought to prohibit plan amendments that suspend benefit payments of retirees who are reemployed in 203(a)(3)(B) service, one may wonder why Congress did not *expressly* provide for this in Section 203? Congress could readily have done this, having included in ERISA Section 203(c) detailed rules relating to amendments altering vesting schedules. *See* Section 203(c) of ERISA, 29 U.S.C. § 1053(c).

based upon a misinformed interpretation of ERISA Section 204(g)(2).[20]

The Petitioner fairly details the deficiencies that underscore the reasoning of the majority below that a "suspension" under ERISA Section 203(a)(3)(B) equates to a "reduction" under ERISA Section 204(g).[21] As Petitioner explains, the majority's reading of the Act is contrary to fundamental precepts of statutory interpretation, its interpretation of amendments to ERISA Section 204(g) is contrary to the legislative history of the Retirement Equity Act of 1984, and its holding is contrary both to applicable regulations and the repeatedly stated position of the Internal Revenue Service.

The importance of the longstanding position of the Service to the sponsors and administrators of multiemployer pension plans cannot be overstated. Trustees of pension plans affiliated with the NCCMP have requested advance approval from the Internal Revenue Service regarding the continued qualification of their plans before adopting suspension of benefit rules or amending existing rules so as to expand the scope of disqualifying employment for all participants, active and retired. Many other plan trustees have adopted amendments and filed amended and restated plans with the Service for determination of continued tax-qualified status, disclosing that their plans have been amended to include or expand

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[20] The distinctions between ERISA's vesting provisions and its accrual provisions are critical ones. *See, e.g., McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 159 (2d Cir. 2003):

> Congress has treated accrued benefits and vested benefits differently. The Supreme Court has found ERISA to be "an intricate, comprehensive statue." *Boggs v. Boggs*, 520 U.S. 833, 834 (1997). ERISA is a complicated enough statute without the courts soldering new Sections onto it.

[21] In this regard, Judge Cudahy's dissent also offers a discerning refutation of the reasoning underpinning the majority's decision below.

suspension of benefit provisions without regard to a participant's status as a retiree.

In all of these instances, the Service has either given its prior blessing when requested, or it has approved the amendments after the fact.[22] No such suspension amendment has been challenged or rejected by the Service on the theory that it allegedly violated ERISA's anti-cutback provision.[23] In accordance with prior opinions of other circuits,[24] the Fifth Circuit's unanimous holding in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir 1998) expressed full concurrence with this interpretation of the Act.

The position of the Internal Revenue Service regarding Section 203(a)(3)(B) is expressly set forth in its Multiemployer Plan Guidelines, which state that "[a]n amendment that reduces I.R.C. 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate I.R.C. 411(d)(6)." Multiemployer Plan Guidelines § 4.72.14.3.5.3(7). This declaration carries considerable weight, since the Guidelines set forth the technical guidance for the Service's field personnel, technical staff, and plan determination personnel. Multiemployer Plan Guidelines § 4.72.14.1. When reviewing

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[22] *See also* U.S. Cert *Amicus* Br. 13-14.

[23] If such an amendment did violate Section §204(g) (I.R.C. § 411(d)(6)), the plan would be treated as not satisfying the requirements of ERISA's minimum vesting standards and would risk losing its tax qualified status. *See* I.R.C. § 411(d)(6)(A) ("A plan shall be treated as not satisfying the requirements of this Section if the accrued benefit of a participant is decreased by an amendment of the plan. . .").

[24] *See Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir. 1995) (recognizing that ERISA Section 204(g) "involve[s] a reduction or elimination of accrued benefits and retirement-type subsidies, not a suspension, as is the case here"); *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572, 575 n.5 (11th Cir. 1987) (explaining that under ERISA a pension that is "fully vested . . . cannot be reduced, but it can be suspended").

a multiemployer plan for compliance with ERISA and the Service's myriad regulations, IRS personnel rely on the Guidelines to determine whether the plan is a qualified plan pursuant to I.R.C. § 401(a) and thus entitled to favorable tax treatment.

Accordingly, with the full blessing of the Internal Revenue Service, trustees of multiemployer pension plans have repeatedly exercised the authority to adopt and expand disqualifying employment provisions within the scope of Section 203(a)(3)(B)(ii) and Department of Labor Regulations.

2. *For years, trustees of multiemployer pension plans have taken their right to amend suspension of benefit provisions into account when considering the feasibility of providing particular benefits.*

The Respondents assert that by law they were entitled to rely on receipt of their monthly pension payment in order to supplement their income. Pet. App. 10a n.5. However, ERISA's vesting rules place express limits on a participant's right under that Act to pension payments while working in 203(a)(3)(B) service.[25] Thus, any right Respondents had to

[25] It is also notable that the Respondents were in their early forties at the time they brought this action. Both ERISA and the Internal Revenue Code show that distributions to younger reemployed "retirees" from tax-qualified plans are generally disfavored. For example, I.R.C. § 72(t) places a 10-percent additional tax on early distributions from qualified retirement plans. The legislative history of that provision of the Code provides—

> Although Congress recognized the importance of encouraging taxpayers to save for retirement, Congress also believed that tax incentives for retirement savings were inappropriate *unless the savings generally were not diverted to nonretirement uses.* One way to prevent such diversion was to impose an additional income tax on early withdrawals from tax-favored retirement arrangements

benefit payments while employed in 203(a)(3)(B) service arose out of the plan document, not ERISA, and was limited by the trustees' discretion and the trustees' amendment powers as set forth in the plan.

By contrast, the reliance of plan trustees on the ability to amend suspension of benefit rules has a firm legal basis. The flexibility to revise suspension rules has been a significant factor in the trustees' consideration of adjustments and improvements in benefit levels, which are often necessary and desirable in the face of increases in the cost of living. When trustees and plan actuaries consider benefit improvements, including but not limited to those relating to subsidized early retirement benefits, they rely on the existing statutory and regulatory scheme as interpreted and applied by the Service and by the courts. Thus, for example, when the trustees of the Central Laborers' Pension Fund considered whether that plan could afford to provide early retirees with a heavily subsidized Service-Only Pension, the trustees and their actuaries were entitled to include the power to suspend benefit payments in their equation. Plan amendments relaxing and tightening suspension of benefit rules within the scope of 203(a)(3)(B) are among the tools Congress provided to protect plan assets,[26] and trustees have been entitled to rely upon the continuing viability of that tool.

> in order to discourage withdrawals and to recapture a measure of the tax benefits that had been provided.

STAFF OF THE JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 713-14 (May 4, 1987) (emphasis added).

[26] The use of suspension of benefit ruies to protect a plan's overall funding for the benefit of all participants and beneficiaries is fully consistent with the overarching fiduciary obligations of plan trustees. *See Caterino v. Barry*, 8 F.3d 878, 883-884 (1st Cir. 1993) (discussing how defined benefit multiemployer plan trustees may balance the interests of

3. *The decision below, if adopted by the Court, will have significant adverse impacts.*

The majority below dismisses the adverse impact its ruling will have on the Central Laborers' Pension Fund, its participants and beneficiaries, noting that the plan can simply "curb[ ] certain reemployment prospectively." Pet. App. 10a n.6. Similarly, in their brief in opposition to the petition for writ of certiorari, the Respondents contend that if the financial integrity of a pension plan is in jeopardy, the trustees may seek the protections of ERISA Section 302(c)(8) relating to cutbacks of accrued benefits in times of "substantial business hardship." This myopic view—putting aside the gross unfairness of imposing such measures on a plan that has operated in full compliance with existing law—ignores the broader implications that such a change would have for multiemployer plans.

The new rule of law suggested by the decision below would require plan trustees to find ways to shift the financial burden of funding double dippers' benefit payments to other classes of plan participants. The group most likely to be affected consists of active participants whose future rate of benefit accruals can be reduced by amendment. Current and future retirees may also find that they receive fewer and smaller benefit increases, as plans adjust their funding assumptions to account for the new obligations imposed by such a ruling.

For those multiemployer plans unfortunate enough to have to seek relief under the substantial business hardship exception of ERISA Section 302(c)(8), the damage will be far greater. Indeed, the majority below and the Respondents fail to appreciate what is well understood by the *amici*: distressed multiemployer pension plans do not attract new employers

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"actuarially-favored" groups against the interest of providing a "guaranteed decent pension for all longtime workers.").

and pose a strong disincentive for current employers to continue contributing after their contracts expire. These hardships are compounded in the case of multiemployer pension plans with large proportions of older participants, in which a steady stream of new participating employers is a key aspect to their financial stability. Any employer considering participation in a multiemployer defined benefit plan must account for the fact that the contributions it makes to the plan will fund not only the pensions of its own workers but the plan's entire accumulated liabilities, including the benefits of other employers' active employees, inactive employees, retirees, and any double dipping retirees.

Moreover, the highly likely result of the ruling proposed by Respondents would be that plans would be amended prospectively so as to implement the strictest suspension provisions possible under Department of Labor regulations. This will mean that future early retirees will experience suspensions that current early retirees do not. It will mean that plan sponsors will no longer be able to use adjustments in their suspension of benefit provisions to encourage older experienced workers to temporarily return to covered employment in times of skills shortages. Moreover, during periods of high unemployment, pension plans will be far less likely to enhance early retirement benefits and subsidies to encourage workers to accept early retirement, knowing that these employees cannot be wooed back to work later by the easing of suspension rules.

The new rule would also clearly have an adverse effect on plans that have previously amended their suspension of benefit provisions to suspend benefits of current retirees. Funds, like the Petitioner, would now incur unanticipated liability for benefit payments withheld on account of previously adopted amendments expanding disqualifying employment. Prospectively, retirees who had refrained from reentering the workforce because of such an amendment may

now reenter "disqualifying employment" while receiving benefits under the plan, thus taking jobs away from individuals who do not have the luxury of supplemental "retirement" income.

Such funds will also be required to amend their suspension rules once again, and in so doing they will be forced to consider adoption either of different rules applicable to different retirees or—more likely—different rules applicable to benefits accrued during different time periods. Thus, some funds may feel compelled to adopt and apply the strictest available suspension rules to future accruals, adding further complications to benefit calculations for future retirees. Both the plan amendment process and the incorporation of additional computations into benefit calculations of future retirees would impose an additional burden on plans, contrary to Congress' stated intent to insulate them from onerous and costly administrative procedures in carrying out suspension rules.

In summary, by imposing a major new restriction on plans that have long relied on a contrary rule, adoption of the holding below may set in motion a series of events that will disserve the interests of multiemployer plans, retirees, active employees, sponsoring employers and labor organizations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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